No. 14-981

NOV - 2 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF U.S. SENATORS HARRY REID, RICHARD BLUMENTHAL, COREY BOOKER, BARBARA BOXER, CHRISTOPHER A. COONS, RICHARD J. DURBIN, DIANNE FEINSTEIN, AL FRANKEN, BARBARA A. MIKULSKI, AND PATTY MURRAY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

MITCHELL Y. MIRVISS
Counsel of Record
MARIA E. RODRIGUEZ
VENABLE LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21202
(410) 244-7412
mymirviss@venable.com

Counsel for Amici Curiae

November 2, 2015

262354

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i

TABLE OF CITED AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT.....2

ARGUMENT.....4

I. Diversity in higher education is a compelling state interest that warrants continued constitutional protection. 4

A. The Court's repeated recognition that there is a compelling state interest in promoting diversity in higher education is constitutionally sound and valid.....4

B. The benefits of diversity in higher education are well-established and undeniable. 7

II. Because of the compelling national interests served, Congress and the Executive Branch consistently have endorsed diversity in higher education..... 11

Table of Contents

Page

III. Congress and the executive branch have a constitutionally prescribed role in helping identify compelling national interests. 21

CONCLUSION 24

TABLE OF CITED AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 6, 7

Atkins v. Virginia,
536 U.S. 304 (2002) 22-23

Bartlett v. Strickland,
556 U.S. 1 (2009) 10

Burnham v. Superior Court,
495 U.S. 604 (1990) 22

Burson v. Freeman,
504 U.S. 191 (1992) 22

Coker v. Georgia,
433 U.S. 584 (1980) 22

Conroy v. Aniskoff,
507 U.S. 511 (1993) 13

Fisher v. Univ. of Texas at Austin,
570 U.S. __, 133 S. Ct. 2411 (2013) ..... *passim*

Grove City College v. Bell,
465 U.S. 555 (1984) 13

Grutter v. Bollinger,
539 U.S. 306 (2003) ..... *passim*

Cited Authorities

Page

Landgraf v. U.S.I. Film Prods.,
511 U.S. 244 (1994) 13-14

Ledbetter v. Goodyear Tire & Rubber Co.,
550 U.S. 618 (2007) 13

McCarthy v. Bronson,
500 U.S. 136 (1991) 13

Parents Involved in Community Schools v. Seattle Sch. Dist., No. 1,
551 U.S. 701 (2007) 5, 6, 11

Penry v. Lynaugh,
492 U.S. 302 (1989) 23

Regents of the University of California v. Bakke,
438 U.S. 265 (1978) 4

Republican Party of Minn. v. White,
536 U.S. 765 (2002) 22

Stanford v. Kentucky,
492 U.S. 361 (1989) 23

Sutton v. United Airlines, Inc.,
527 U.S. 471 (1999) 14

Sweatt v. Painter,
339 U.S. 629 (1950) 11

Cited Authorities

Page

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,
534 U.S. 184 (2002) 14

Washington v. Glucksberg,
521 U.S. 702 (1997) 22

STATUTES AND CTHER AUTHORITIES

U.S. Const. amend. I 22

U.S. Const. amend. XIII § 2 2

U.S. Const. amend. XIV 6, 13

U.S. Const. amend. XIV § 5 ..... 2, 23

7 U.S.C. § 5925 17

14 U.S.C. § 182 17

20 U.S.C. § 1067q 14

20 U.S.C. § 1067q(b)(2)(B) 15

20 U.S.C. § 1070a 19

20 U.S.C. § 1092(a)(1)(Q) 15

20 U.S.C. § 1101 15

Cited Authorities

Page

20 U.S.C. § 1131 ..... 17, 18

20 U.S.C. § 1136 ..... 17, 18

20 U.S.C. § 1161g 18

20 U.S.C. § 1400(c)(13)(B) 16

20 U.S.C. § 6494 16

20 U.S.C. § 7231(a)(4)(A) 12

20 U.S.C. § 9709 15

41 U.S.C. § 1862n-1 16

42 U.S.C. § 12101 14

42 U.S.C. § 2000d-4a 13

42 U.S.C. § 2000d-7 13

42 U.S.C. § 2000e-5(e)(3)(A) 13

51 U.S.C. § 40901 17

56 Fed. Reg. 64 20

59 Fed. Reg. 8 20

Cited Authorities

Page

74 Fed. Reg. 36174 21

75 Fed. Reg. 78486 21

149 Cong. Rec. S8432-02, S8432-33 (daily ed. June 24, 2003) (Statement of Sen. Durbin).....14

154 Cong. Rec. H7658-03, 7658 (daily ed. July 31, 2008) (statement of Rep. Miller) 16

154 Cong. Rec. H7658-03, 7663 (daily ed. July 31, 2008) (Statement of Rep. Davis).....15

156 Cong. Rec. S1923-1908, 1984 (daily ed. Mar. 24, 2010) (statement of Sen. Harkin) 19

Fed. R. Civ. P. 37.3.....1

Fed. R. Civ. P. 37.6.....1

Andrew Kull, *The Color-Blind Constitution* 67 (1992) .6

Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 Calif. L. Rev. 1299 (2008) 9

Charles C. Moskos & John Sibley Butler, *All That We Can Be: Black Leadership & Racial Integration the Army Way* (1996).....18

Cited Authorities

Page

Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) 14

Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197 (2010) 9

Emergency School Aid Act ("ESAA"), Pub. L. No. 92-318, Title VII, §§ 701-720, 86 Stat. 235 (1972) 11, 12

H.R. Rep. No. 92-576 (1971) 12

H.R. Rep. No. 106-645 (2000) 17-18

H.R. Rep. No. 107-229 (2001) 18

Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427 (1997) 6

Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 Mich. J. Race & L. 63 (2011) 8

Nicholas A. Bowman, *et al.*, *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, 52 J.C. Student Dev. 729 (2011) 8

Cited Authorities

Page

Nicholas A. Bowman, *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*, 81 Rev. Educ. Res. 29 (2011).....8

Nicholas Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis*, 80 Rev. Educ. Res. 4 (2010).....7-8

S. Rep. No. 92-61 (1971).....12

S. Rep. No. 96-49 (1979).....16

S. Rep. No. 101-412 (1990).....16

Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research*, 61 J. Soc. Issues 595 (2005).....7

The Excellence in Mathematics, Science, and Engineering Education Act of 1990, Pub. L. No. 101-589, 104 Stat. 2881.....

Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751 (2006).....8

Title VI of the Civil Rights Act of 1964 .....13, 20, 22

Cited Authorities

Page

Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society: Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615 (2008). 8

U.S. Dep't of Educ., Office for Civil Rights, The Use of Race in Postsecondary Student Admission (2008) 21

U.S. Dep't of Justice, Civil Rights Div. & U.S. Dep't of Educ., Office for Civil Rights, Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education (2011). 21

I

STATEMENT OF INTEREST

Amici, United States Senators representing different parts of the country, some of whom submitted an *amicus* brief to this Court in connection with *Fisher v. Univ. of Texas at Austin* ("*Fisher I*"), 570 U.S. --, 133 S. Ct. 2411 (2013), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), submit this Brief to urge the Court not to depart from the settled principle that institutions of higher education have a compelling interest in the educational benefits of diversity.[1] This Court has held that such institutions may, without offending the Constitution, adopt policies that consider race as one of a number of factors in determining which academically qualified applicants to admit.[2] Issues of race have attracted widespread attention in the past year, highlighting the importance of diversity in shaping a nation that is just, both in fact and in appearance.

As members of the legislative branch of government charged with responsibility for "enforc[ing], by appropriate legislation" the mandates of the United States Constitution

---

1. Pursuant to Rule 37.6, *amici curiae* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this Brief. Letters from the parties consenting to the filing of this Brief are on file with the Clerk pursuant to Rule 37.3.

2. This Court has long held that diversity in higher education is a compelling state interest. Petitioner, however, asks this Court to change the law and depart from that settled principle. *See, e.g.*, Pet Br. at 44 ("Nor is an interest in classroom diversity compelling"). Accordingly, *amici* submit this brief to reiterate the continuing need for diversity and to describe the legislative branch's reliance on this Court's prior holdings.

prohibiting discrimination, *see* U.S. Const. amends. XIII § 2, XIV § 5, we have a unique perspective on the issues now before the Court. *Amici* have devoted substantial attention to the critical concerns implicated by the Court's decisions in this area, and we have worked to forge consensus on measures aimed at broadening educational opportunity and promoting inclusion.

This Brief aims to bring to the Court's attention the actions, assessments and judgments of the legislative branch of the federal government concerning the questions raised in this case.

SUMMARY OF ARGUMENT

This Court has long recognized the intrinsic value of a diverse student population. Ample empirical evidence both before and after *Fisher I* and *Grutter* confirms the paramount importance of policies that promote racial diversity in higher education. Admissions policies aimed at promoting diversity have strengthened all aspects of our society, including our nation's economy and democratic institutions. Such policies go to the core functions of higher education – broadening the minds of youth, preparing them to exercise their civic rights, and providing them with pathways to leadership that will protect America's national security and promote the nation's global competitiveness. As this Court has long recognized, "the attainment of a diverse student body ... serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes." *Fisher I*, 133 S. Ct. at 2418; *see also Grutter*, 539 U.S. at 324 ("nothing less than the 'nation's future depends upon leaders trained through wide exposure' to the ideas

and mores of students as diverse as this Nation of many peoples.'") (citations omitted)).

As shown below, there is no reason for the Court to abandon time-tested precedent that recognizes the compelling interest that colleges and universities have in obtaining the educational benefits of a diverse student population. In this critical context, the standards articulated by this Court have proved intelligible to educators, legislators, and courts alike.

Further, in the years since this Court addressed the issue of race-conscious university admissions policies in *Fisher I* and in *Grutter*, the legal and factual bases for those decisions have not eroded. Both Congress and the Executive have implemented the Court's holdings that diversity in the student population of schools of higher education is a compelling national interest. This effort has been embraced by members of both political parties, and has prevailed across administrations with different political philosophies. It has been expressed through numerous legislative acts and through longstanding, congressionally endorsed Executive interpretation.

These measures reflect a broader congressional judgment that advancing diversity and inclusion in colleges and universities is necessary to reach our fundamental national goals. In again reviewing the University of Texas's admissions policies, this Court should not lightly set aside determinations of the branch of government elected by the people and vested by the Constitution with responsibility for identifying measures to secure the constitutional rights of all Americans.

Congress has consistently stressed the importance of promoting a pathway to leadership for students of all races. As this Court recognized in both *Fisher I* and *Grutter*, such open and accessible pathways to leadership are a critical benefit of diversity in the nation's colleges and universities. "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Grutter*, 539 U.S. at 332. Only by ensuring that "all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America" can we foster confidence in the openness and integrity of those institutions and of our society. *Id.* at 332-333. Congress's – and the public's – continued support of our nation's higher education institutions is premised in part on this commitment to access and inclusion for all students.

ARGUMENT

I. Diversity in higher education is a compelling state interest that warrants continued constitutional protection.

A. The Court's repeated recognition that there is a compelling state interest in promoting diversity in higher education is constitutionally sound and valid.

First in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and then as more fully articulated in *Grutter*, this Court settled the tension regarding higher education admissions policies between

conflicting legal and constitutional imperatives driven by a reprehensible past and a dream for a future where racial inequality no longer divides Americans. More recently, those holdings were reiterated by the Court in *Parents Involved in Community Schools v. Seattle Sch. Dist., No. 1*, 551 U.S. 701, 722-723 (2007) and in *Fisher I*.

The standards set by those decisions are well understood by educators, legislators, and the courts. Race-conscious admissions policies are strictly scrutinized, and only those that are narrowly tailored to achieve the compelling interest in a diverse student body will pass constitutional muster. Thus, while admissions policies that focus principally on race or use quotas are proscribed, *see Fisher I*, 133 S. Ct. at 2418; *Grutter*, 539 U.S. at 334, institutions that pursue the educational benefits of diversity may consider race among various factors for deciding which academically qualified applicants should be admitted. *See Fisher I*, 133 S. Ct. at 2418 ("In *Grutter*, the Court reaffirmed [the] conclusion that obtaining the educational benefits of student body diversity is a compelling state interest that can justify the use of race in university admissions.") (internal quotations omitted); *see also Parents Involved*, 551 U.S. at 722 ("The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual.").

A central tenet of this Court's teachings in this area is the discretion vested in educators to determine, in light of the mission and details specific to any given institution, whether "'such diversity is essential to its educational mission.'" *Fisher I*, 133 S. Ct. at 2419 (quoting *Grutter*, 539 U.S. at 328; *id.* ("On this point, the District Court

and Court of Appeals were correct in finding that *Grutter* calls for deference to the University's conclusion.") This Court has recognized that the Fourteenth Amendment did not intend to foreclose government consideration of race *per se*. *See Grutter*, 539 U.S. at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause. ... Not every decision influenced by race is equally objectionable"); *id.* ("When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied."). The Fourteenth Amendment's Framers understood and acted on this flexibility. *See* Jed Rubenfeld, *Affirmative Action*, 107 Yale L.J. 427, 430-431 (1997) (discussing enactment of explicitly race-conscious statutes by the Reconstruction Congress); Andrew Kull, *The Color-Blind Constitution* 67 (1992) (citing evidence that the Thirty-ninth Congress rejected proposed "color-blindness" language in the Fourteenth Amendment).

Members of the Court have made clear that policies aimed at inclusion do not pose the same constitutional hazards as those that seek exclusion or separation. *See Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring) ("This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children."); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 229 (1995) (affirming that strict scrutiny does not ignore the "difference between an engine of oppression and an effort to foster equality in society") (internal citations omitted).

In *Fisher I*, this Court held that, although Universities should be given deference to decide whether diversity is a compelling interest, the courts must ultimately determine whether "the means chosen by the University to attain diversity are narrowly tailored to that goal." Reaffirming that "'narrow tailoring does not require exhaustion of every *conceivable* race-neutral alternative,'" 133 S. Ct. at 2420 (emphasis added in original) (quoting *Grutter*, 539 U.S. at 339-340)), the Court noted that "[s]trict scrutiny must not be 'strict in theory but fatal in fact.'" *Id.* at 2421 (quoting *Adarand*, 515 U.S. at 237).

B. The benefits of diversity in higher education are well-established and undeniable.

No clear change of circumstances has occurred in the two years since the Court decided *Fisher I* or in the nine years since it decided *Grutter*, that would justify abrogating *stare decisis* and overruling those cases, much less Justice Powell's decisive opinion more than three decades previously in *Bakke*. To the contrary, an ever-mounting body of empirical and social science research demonstrates that students and the nation as a whole benefit from admissions policies that promote student diversity. Post-*Grutter* studies affirm that student body diversity can strongly and positively affect learning, both in and out of the classroom.[3] Other studies show that a racially

---

3. *See, e.g.*, Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research*, 61 J. Soc. Issues 595, 600-607 (2005) (longitudinal study of over 4,400 students at nine public universities finding that diversity improves analytical problem-solving skills, complex thinking skills, socio-cognitive skills, and democratic sensibilities); Nicholas Bowman, *College Diversity Experiences and Cognitive Development: A Meta-*

diverse environment promotes attitudes that increase racial harmony[4] and improve the classroom experience,[5] and provide lifelong benefits in increased leadership and civic engagement.[6] Contrary to some claims, minority students clearly benefit from race-conscious admissions

---

Analysis, 80 Rev. Educ. Res. 4, 20 (2010) (meta-analysis of twenty-three studies, finding positive gains in cognitive development).

4. *See* Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751, 766-768 (2006) (analysis of 500 studies, finding that positive intergroup contact reduces prejudice).

5. *See* Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 Mich. J. Race & L. 63, 97-103 (2011) (post-*Grutter* study of 500 University of Michigan Law School students, finding that greater diversity led to improved learning, open minds, engaging classroom conversations, greater participation by minority students, and less tokenism).

6. *See, e.g.*, Nicholas A. Bowman, *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement*, 81 Rev. Educ. Res. 29, 4[illegible] (2011) (meta-analysis of twenty-seven studies, concluding that college diversity experiences positively correlate with increased civic engagement); Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society: Campus Diversity and Cross-Cultural Workforce Competencies*, 78 Harv. Educ. Rev. 615, 641-643 (2008) (finding that post-college leadership skills substantially relate to student body diversity and cross-racial interaction during college); Nicholas A. Bowman, *et al.*, *The Long-Term Effects of College Diversity Experiences: Well-Being and Social Concerns 13 Years After Graduation*, 52 J.C. Student Dev. 729, 737 (2011) (longitudinal study finding that diversity experiences are positively related to personal growth, purpose in life, recognition of racism, and volunteering behavior).

policies.[7] This post-*Grutter* research affirms that the Court's decisions have properly recognized that diversity in higher education is a compelling state interest.

All of these benefits from diversity in higher education, be they narrowly pedagogical or more generalized, are valid compelling interests. Of the three distinct educational objectives served by diversity in higher education recognized in *Grutter*, only one focuses on the educational experience itself: increased perspectives ("classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds"). *See Grutter*, 539 U.S. at 330. The others, professionalism (*see id.*, student body diversity better prepares students as professionals), and civic engagement (*see id.* at 332, "effective participation by members of all racial and ethnic groups in the civic life of our Nation") are valid state interests as well. The cognizable compelling benefits of diversity therefore go far beyond the classroom.

---

7. *See, e.g.*, Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197, 1217-1233 (2010) (finding that in states that bar race-conscious admissions, three-fourths of students felt pressure to prove themselves due to their race and nearly one-half reported having their qualifications questioned, while in schools with race-conscious admissions, less than half of the students felt pressured to prove themselves due to race and only one-quarter reported having had their qualifications questioned); Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 Calif. L. Rev. 1299 (2008) (findings for elite law schools).

These aims are important. Today's workforce and our nation's civic life are increasingly diverse. Those who have been exposed to, learned from, taught, and formed friendships with individuals unlike themselves, and have thus gained an understanding of "diverse people, cultures, ideas and viewpoints" (*id.* at 330), are better prepared to enter and excel in an increasingly global professional arena. Similarly, increasing civic engagement by minority citizens is a significant national goal given the country's ongoing struggle with the impact of segregation and discrimination. *Cf. Bartlett v. Strickland*, 556 U.S. 1, 25 (2009) ("Much remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions."). Having individuals in positions of government and corporate leadership who have substantial ties to otherwise isolated minority communities has helped assure that our government responds to all its citizens, regardless of race. Quite apart from the tens of thousands of individuals whose life experiences have been radically changed by the approval of limited, race-sensitive admissions policies, and the innumerable others (classmates, children, neighbors and institutions) who can be shown to have benefited, in the absence of such policies, the Nation will lose a critical tool in the struggle to overcome both racial separation and the mistrust it engenders.

Despite affirmative action's success in fostering integration, there is far to go, especially for a nation that rightly prides itself on expanding the notion of liberty. As Justice Kennedy stated:

> Our Nation from the inception has sought to preserve and expand the promise of liberty

> and equality on which it was founded. Today we enjoy a society that is remarkable in its openness and opportunity. Yet our tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain. This is especially true when we seek assurance that opportunity is not denied on account of race. The enduring hope is that race should not matter; the reality is that too often it does.

Parents Involved, 551 U.S. at 787. As discussed in the next section of this Brief, the legislative branch has acted with that history and promise in mind.

II. Because of the compelling national interests served, Congress and the Executive Branch consistently have endorsed diversity in higher education.

For more than two generations, federal education law and policy have recognized the critical educational importance of having students from diverse backgrounds and the harm that occurs when diversity is absent. *See Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (rejecting the notion that a racially segregated law school could provide an "equal" education, as a "law school ... cannot be effective in isolation from the individuals and institutions with which the law interacts"). In his 1970 message proposing the Emergency School Aid Act ("ESAA"), Pub. L. No. 92-318, Title VII, §§ 701-720, 86 Stat. 235, 354-371 (1972) (repealed 1981), President Nixon stated:

> This Act deals specifically with problems which arise from racial separation, whether deliberate

> or not, and whether past or present. It is clear that racial isolation ordinarily has an adverse effect on education. Conversely, we also know that desegregation is vital to quality education – not only from the standpoint of raising the achievement levels of the disadvantaged, but also from the standpoint of helping all children achieve the broad-based human understanding that increasingly is essential in today's world.

H.R. Rep. No. 92-576, at 3 (1971). Congress concurred, declaring that "racially integrated education improves the quality of education for all children." *Id.* at 10. Congress recognized both that "[e]ducation in an integrated environment, in which children are exposed to diverse backgrounds, is beneficial to both [minority and nonminority children]," S. Rep. No. 92-61, at 7 (1971), and that "[w]hether or not it is deliberate, racial, ethnic, and socio-economic separation in our schools and school systems [has] serious and often irreparable adverse effects on the education of all children, be they from deprived or from advantaged backgrounds." *Id.* at 6. Although the ESAA was subsequently repealed, Congress has remained committed to the importance of student-body diversity in policies affecting education at all levels. *See, e.g.*, No Child Left Behind Act of 2001, Pub. L. 107-110, § 5301(a)(4)(A), 115 Stat. 1425, 1806 (2002) (codified at 20 U.S.C. § 7231(a)(4)(A)) (finding that "[i]t is in the best interests of the United States ... to continue the Federal Government's support of ... local educational agencies that are voluntarily seeking to foster meaningful interaction among students of different racial and ethnic backgrounds[.]").

Specifically in the context of higher education, ever since *Bakke*, Congress and the Executive Branch have treated as settled law the notion that having a diverse student body in the nation's institutions of higher learning is a compelling national interest and that policies that are narrowly tailored to achieve that goal do not offend either Title VI of the Civil Rights Act of 1964 or the Fourteenth Amendment.

After Justice Powell's pronouncement on diversity in *Bakke*, Congress twice passed significant amendments to Title VI – both signed into law by President Reagan – without seeking to limit the ability of colleges and universities to use race-conscious measures to obtain the educational benefits of diversity. In the Rehabilitation Act Amendments of 1986, for example, Congress abrogated the States' Eleventh Amendment immunity under Title VI and other statutes. *See* Pub. L. No. 99-506, Title X, § 1003, 100 Stat. 1807, 1845 (1986) (codified at 42 U.S.C. § 2000d-7). Congress was quite familiar with the *Bakke* decision and should be presumed to have considered it when Congress amended Title VI. *See McCarthy v. Bronson*, 500 U.S. 136, 140 (1991); *Conroy v. Aniskoff*, 507 U.S. 511, 516 (1993). By contrast, when Congress has disapproved of judicial interpretation of a federal civil rights statute, it has not been reticent about amending the law. *See, e.g.*, Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 42 U.S.C. § 2000d-4a *et seq.*) (amending Title VI and related statutes in response to *Grove City College v. Bell*, 465 U.S. 555 (1984)); Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5, 5-6 (codified at 42 U.S.C. § 2000e-5(e)(3)(A)) (amending Title VII in response to *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007)); *Landgraf v. U.S.I. Film Prods.*,

511 U.S. 244, 250-51 (1994) (noting that the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), responded to nine Supreme Court decisions construing federal employment discrimination statutes)); *see also, e.g.*, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2, 122 Stat. 3553, 3553-3554 (2008) (codified at 42 U.S.C. § 12101 *et. seq.*) (amending the Americans with Disabilities Act in response to *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002)).

When this Court reiterated in *Grutter* that the state has a compelling interest in achieving student-body diversity, many members of Congress voiced their endorsement. For example, Senator Richard Durbin spoke for many when he stated that, "[t]he Court's decision [in *Grutter*] reaffirms the compelling interest in racial and ethnic diversity-universities may continue to include race as one factor among many when selecting its students. Diversity programs promote the integration and full participation of all groups in our society." 149 Cong. Rec. S8432-02, S8432-33 (daily ed. June 24, 2003) (statement of Sen. Durbin).

Relying on the Court's decisions recognizing that diversity in higher education is a compelling state interest, Congress has enacted significant pieces of legislation promoting student body diversity and has sought to reduce racial isolation and to promote inclusion and access to educational opportunities in higher educational institutions. For instance, the College Cost Reduction and Access Act, Pub. L. No. 110-84, § 802, 121 Stat. 784, 817-818 (2007) (codified at 20 U.S.C. 1067q), provided funds to "increase the number of Hispanic and other low

income students attaining degrees in the field of science, technology, engineering or mathematics." 20 U.S.C. § 1067q(b)(2)(B). Additionally, in 2008, Congress passed the Higher Education Opportunity Act, Pub. L. No. 110-315, § 502, 122 Stat. 3078, 3331 (2008) (codified at 20 U.S.C. 1101 *et. seq.*), a reauthorization of the Higher Education Act, in which it established many programs to encourage diversity in higher education, such as Promoting Postbaccalaureate Opportunities for Hispanic Americans. In addition to the establishment of new programs, the Higher Education Opportunity Act called for a study of minority male academic achievement and a study of bias in standardized tests. *See* Pub. L. No. 110-315, §§ 1109-1110, 122 Stat. 3078, 3495-3496 (2008) (codified at 20 U.S.C. § 9709 note (Study of Minority Male Academic Achievement / Study on Bias in Standardized Tests)). The Higher Education Opportunity Act also enacted a new requirement for institutions to report information on student body diversity to prospective and enrolled students, including the percentage of the student body who self-identified as a member of a major racial or ethnic group. *See id.* at § 488, 122 Stat. at 3293-3294 (codified at 20 U.S.C. § 1092(a)(1)(Q)). In his floor statement, Representative Danny Davis remarked on the bill: "I am happy that the bill emphasizes the need to support populations that are underrepresented in higher education...These provisions will help ensure that the higher education community better reflects the diversity of our Nation." 154 Cong. Rec. H7658-03, 7663 (daily ed. July 31, 2008) (Statement of Rep. Davis). Representative George Miller summarized the goal of the Higher Education Opportunity Act in increasing accessibility to higher education in his remarks, saying: "In America, a college degree has always been the ticket to [the] middle

class. More and more, our future depends upon our ability to produce well-educated and skilled workers to take the jobs of the 21st century." 154 Cong. Rec. H7658-03, 7658 (daily ed. July 31, 2008) (statement of Rep. Miller).

Congress' enactment of legislation in other related areas demonstrates its understanding of the compelling national interest in diversity. For example, in 1979, Congress vested the National Science Foundation with responsibility for "efforts which provide support for ... ethnic minorities." S. Rep. No. 96-49, at 52 (1979). The Excellence in Mathematics, Science, and Engineering Education Act of 1990, Pub. L. No. 101-589, 104 Stat. 2881 (repealed 1994), undertook to "increase the number and diversity of individuals entering and completing graduate and doctoral programs[.]" S. Rep No. 101-412, at 4138 (1990). That Act also called upon the National Science Foundation to give "priority consideration to increasing the participation of women and minority students" in awarding fellowships. *Id.*; *see also* Pub. L. No. 107-368, § 10, 116 Stat. 3034, 3049 (2002) (codified at 41 U.S.C. § 1862n-1) (statute directing that scholarship funds be awarded upon consideration of factors including individual applicants' race); Pub. L. No. 107-110, Title I, § 1504, 115 Stat. 1425, 1598-1599 (2002) (codified at 20 U.S.C. § 6494) (same). In the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No. 108-446, § 101, 118 Stat. 2647, 2651 (2004) (codified at 20 U.S.C. § 1400(c)(13)(B)), Congress sought to increase the participation of minorities in the teaching profession, finding that the inclusion of minority individuals in the area of special education was "essential to obtain greater success in the education of minority children with disabilities." More recently, the Food Conservation and Energy Act of 2008

authorized grants to increase participation by women and underrepresented minorities in rural areas in the fields of science, technology, engineering, and mathematics ("STEM"), Pub. L. No. 110-234, § 7204(a)(1)(D)(49), 122 Stat. 923, 1237 (2008) (codified at 7 U.S.C. § 5925), and, in the Coast Guard Authorization Act of 2010, Congress included a provision that seeks to increase minority representation at the Coast Guard Academy by allowing factors such as sex, race, color and religious beliefs of the applicants to be considered. Pub. L. No. 111-281, § 903(b)(4), 124 Stat. 2905, 3011 (2010) (codified at 14 U.S.C. § 182). Congress also emphasized the value of diversity in the America COMPETES Reauthorization Act of 2010, Pub. L. No. 111-358, § 202, 124 Stat. 3982 (2011) (codified at 51 U.S.C. § 40901 note ("NASA's Contribution to Education")), in which it directed NASA to develop and maintain "programs and activities designed to increase student interest and participation in STEM, including from minority and underrepresented groups."

Congress also has enacted laws recognizing that promoting diversity in higher education is integral to achieving workforce diversity in important fields such as law, diplomacy, science, and nursing. *See, e.g.*, Pub. L. No. 105-244, Title VII, § 721(a), 112 Stat. 1581, 1794 (1998) (codified at 20 U.S.C. § 1136) (establishing the Thurgood Marshall Legal Educational Opportunity Program to assist "low-income, minority, or disadvantaged college students" with law studies); Pub. L. No. 102-325, Title VI, § 621, 106 Stat. 448, 734 (1992) (codified at 20 U.S.C. § 1131) (establishing the Minority Foreign Service Professional Development Program to "significantly increase the numbers of African American and other underrepresented minorities in the international service"); H.R. Rep. No.

106-645, at 164 (2000) (funding program to "increase the number of minority students who pursue advanced degrees and careers" in science fields); H.R. Rep. No. 107-229, at 30 (2001) (funding "nursing workforce diversity" program to "increase nursing education opportunities for individuals who are from disadvantaged backgrounds, including racial and ethnic minorities"); *see also* Charles C. Moskos & John Sibley Butler, *All That We Can Be: Black Leadership & Racial Integration the Army Way* (1996) (discussing efforts to promote integration and minority group advancement in the military).

In 2008, Congress reauthorized and expanded the Thurgood Marshall Legal Educational Opportunity Program and the Minority Foreign Service Professional Development Program through the Higher Education Opportunity Act, Pub. L. No. 110-315, §§ 704, 612, 122 Stat. 3078, 3347, 3339-3340 (2008) (codified at 20 U.S.C. §§ 1136, 1131). The Higher Education Opportunity Act also created the Patsy T. Mink Fellowship Program "to assist highly qualified minorities and women to acquire the doctoral degree or the highest possible degree available, in academic areas in which such individuals are underrepresented for the purpose of enabling such individuals to enter the higher education professoriate." Pub. L. No. 110-315, § 807, 122 Stat. 3078, 3392-3396 (2008) (codified at 20 U.S.C. § 1161g).

Congress also has enacted much legislation that makes higher education affordable and within the reach of many students who otherwise could not participate in the American dream. These programs are premised on the assumption that higher educational institutions are open and accessible to minority students. For instance,

Congress has devoted significant resources to federal college affordability in part with the understanding that there would be a diverse group of recipients. *See* Higher Education Opportunity Act, Pub. L. No. 110-315, § 401, Title IV, 122 Stat. 3078, 3188-3190 (2008) (codified at 20 U.S.C. § 1070a) (increasing maximum allowable PELL grants, making PELL grants available for year-round study and expanding eligibility requirements to include part-time students).[8] These programs give practical effect to this Court's statement in *Grutter* that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332.

This record of legislation represents Congress's agreement with the Court's reasoning in *Grutter* that "student body diversity promotes learning outcomes,...

---

8. In expressing support for this legislation, Senator Tom Harkin explained:

> While this legislation seeks to ensure increased access and success for all students, we intend for the Secretary to work with States to address the unique access issues faced by underserved communities, including: low-income individuals, individuals with disabilities, homeless and foster care youth, disconnected youth, nontraditional students, members of groups that are traditionally underrepresented in higher education, individuals with limited English proficiency, veterans, including those just returning from active duty, and dislocated workers.

156 Cong. Rec. S1923-1908, 1984 (daily ed. Mar. 24, 2010) (statement of Sen. Harkin).

better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Grutter*, 539 U.S. at 330 (internal quotation marks omitted). Congress agrees with the Court that our Nation's schools "must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America." *Id.* at 333.

The Executive branch has strictly adhered to this diversity principle. In 1979, shortly after *Bakke*, the Department of Education reviewed its Title VI regulations and concluded that it would interpret the regulations consistent with Justice Powell's opinion. The Department affirmed this understanding in 1991, stating that, under its regulations, "[a] college should have substantial discretion to weigh many factors - including race - in its efforts to attract and retain a student population of many different experiences, opinions, backgrounds, and cultures." Notice of Proposed Policy Guidance, 56 Fed. Reg. 64,548, 64,548 (Dec. 10, 1991). It advised colleges and universities that they could continue to "consider race as one factor among several wher awarding scholarships designed to help create the kind of campus educational environment that results from having a student population with a variety of experiences, opinions, backgrounds, and cultures." *Id.*; *see also* 59 Fed. Reg. 8,756, 8761-8762 (Feb. 23, 1994) (noting that "[t]he Court in *Bakke* indicated that race or national origin could be used in making admissions decisions to further the compelling interest of a diverse student body even though the effect might be to deny admission to some students who did not receive a competitive 'plus' based on race or ethnicity"). More recently, the Bush and the Obama

Administrations have issued guidances implementing the *Grutter* standards for using race as a factor in higher education admissions policy. *See* U.S. Dep't of Educ., Office for Civil Rights, The Use of Race in Postsecondary Student Admissions (2008) (withdrawn and replaced); U.S. Dep't of Justice, Civil Rights Div. & U.S. Dep't of Educ., Office for Civil Rights, Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education (2011), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.html.

Most recently, the U.S. Department of Education identified school diversity as a priority goal for its competitive funding programs. Its "Notice of final supplemental priorities and definitions for discretionary grant programs," 75 Fed. Reg. 78486, 78508 (Dec. 15, 2010), lists sixteen new funding priorities, including "projects that are designed to promote student diversity, including racial and ethnic diversity, or avoid racial isolation." *See also* 74 Fed. Reg. 36174, 36175 (July 22, 2009) (providing competitive grants to local educational agencies to procure "technical assistance in preparing, adopting, or modifying, and implementing student assignment plans to avoid racial isolation and resegregation in the Nation's schools, and to facilitate student diversity, within the parameters of current law").

III. Congress and the executive branch have a constitutionally prescribed role in helping identify compelling national interests.

As described above, Congress has enacted numerous laws and funded numerous programs consistent with this Court's pronouncement that race-conscious admissions

policies that are narrowly tailored to achieve a diverse student-body serve a compelling national interest. Congress has overseen the Executive's adherence to these principles and has twice amended Title VI in full awareness of this Court's rulings. Literally decades worth of legislation was enacted and billions of dollars in funds were appropriated to colleges and universities based on the understanding that this issue was settled and that admissions policies that consider race as but one factor in order to achieve a diverse student body and ensure an open and accessible pathway to leadership for students of all races are legal.

The question whether an interest is "compelling" as opposed to merely "important" should not be resolved by this Court in isolation from the considered judgments and enactments of other branches of government on the same subject. In determining whether a government interest is "compelling" under other constitutional provisions, this Court has looked to prevailing practice. *See, e.g., Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002) (First Amendment); *Burson v. Freeman*, 504 U.S. 191, 215-216 (1992) (Scalia, J., concurring in judgment) (First Amendment); *see also Washington v. Glucksberg*, 521 U.S. 702, 710 (1997) (Due Process Clause). Indeed, this Court has looked to prevailing legislative understanding in determining the meaning not only of doctrinal terms such as "compelling interest," but also constitutional text such as "Due Process of Law" and "Cruel and Unusual Punishment." *See, e.g., Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion); *Coker v. Georgia*, 433 U.S. 584, 592-596 (1980). Although the Court has not yet decided how best to ascertain constitutionally relevant societal judgment, *see, e.g., Atkins v. Virginia*, 536 U.S.

304 (2002), it generally holds that "statutes passed by society's elected representatives," *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989), are the "clearest and most reliable objective evidence." *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989).

In considering the benefits of diversity and the impact of race-neutral admissions policies, the Court should give considerable weight not only to the considered judgments of educators, but also to those of the political branches, which, under the tripartite constitutional scheme, share responsibility for answering these empirical questions. Indeed, determining which policies will help achieve the "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement," *Croson*, 488 U.S. at 505-506, is a task that the Constitution explicitly entrusts to Congress in the first instance. *See* U.S. Const. amend. XIV § 5.

CONCLUSION

This Court should adhere to longstanding and settled precedent that permits educators to consider race as one factor among many when they make admissions decisions, as long as their admissions policies are narrowly tailored to achieve the compelling state interest in student-body diversity. To recognize the compelling state interest in diversity, but then to reject the judgment of educators with expert knowledge about the needs of students and the requirements of a learning environment, would undermine laws that Congress enacted to reflect and support the compelling interest in higher education student body diversity that this Court has repeatedly upheld.

Because we firmly believe that the Court has properly and correctly recognized this principle in its earlier decisions, we ask that the Court reconfirm its prior holdings and affirm the judgments below.

Respectfully submitted,

MITCHELL Y. MIRVISS
Counsel of Record
MARIA E. RODRIGUEZ
VENABLE LLP
750 East Pratt Street, Suite 900
Baltimore, Maryland 21202
(410) 244-7412
mymirviss@venable.com

Counsel for Amici Curiae